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Due Process Rights of Nontenured Teachers-Nonrenewal of Contract

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DUE PROCESS RIGHTS OF NONTENURED TEACHERS—NONRENEWAL OF CONTRACT

INTRODUCTION

When a person is employed by the State, numerous legal conflicts arise between the power of the employer-state and the rights of the employee-citizen. Because of the nature of teaching, *i.e.* public presentation of various doctrines, any of which may be diametrically opposed to those espoused by the hiring body, the conflict is more crystalline than in many other governmental positions. This Comment will concentrate not on the freedoms retained by the citizen-teacher but on the duties owed him by the employer-state. Specifically, the issue under consideration will be whether the governmental unit responsible for hiring the teacher must grant that teacher a statement of reasons and a hearing prior to dismissal. The issue will further be narrowed to one such employee, the nontenured teacher.

For the purposes of this Comment, "teacher" and "professor" will be loosely synonymous unless otherwise specified. Furthermore, within the context of the question as presented, "due process rights" will be used to signify the right to a statement of reasons and a hearing. It is recognized that teachers have certain other due process rights, such as freedom from arbitrary and capricious dismissal;[1] such rights, however, will not be amplified herein.

In recently decided companion cases, the Supreme Court of the United States ruled on the question of due process rights of nontenured professors. Both cases involved professors at state-operated colleges and the right to a statement of reasons and a hearing prior to termination or nonrenewal of the teaching contract. In *Board of Regents of State Colleges v. Roth*,[2] the Court held that no such due process rights existed. In *Perry v. Sindermann*,[3] the opposite result was implied, although the case was remanded for further consideration. The focus of this Comment will be on those two decisions with their effect measured against Pennsylvania law. The legal groundwork regarding the central issue—whether a teacher under state auspices has a constitutional right to a statement of reasons and a hearing prior to dismissal—has been estab-

1. *See, e.g.*, Nicolella v. School Bd., 444 Pa. 541, 281 A.2d 832 (1971), cited at notes 116-18 *infra*.
2. 408 U.S. 564 (1972).
3. 408 U.S. 593 (1972).

lished by the lower courts; a discussion of such cases is necessary to provide the background facing the Court at the time of the decisions.

Discussing the lower court decisions, the Supreme Court noted: "The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing have come to varying conclusions."[4] The most notable case is *Orr v. Trinter*,[5] in which the Sixth Circuit Court of Appeals determined that no procedural safeguards were required. Other Circuit Court decisions cited by the Supreme Court to the same effect were *Jones v. Hopper*[6] and *Freeman v. Gould Special School District.*[7] In the *Jones* case, although the Supreme Court is correct in its explanation of the holding, the reasoning is more closely aligned with the Fifth Circuit "expectancy of employment" decisions.

The "expectancy of employment" rationale was established by Judge Learned Hand in a decision primarily concerned with tort law, specifically interference with prospective advantage, rather than on the constitutional question.[8] Nevertheless, the phrase was imbued into due process considerations by the Fifth Circuit,[9] thus establishing the criterion of "expectancy of employment" as the basis for entitlement to a statement of reasons and a hearing. The concept was expanded by a later case to the determination that "[t]he substance of due process required that no instructor who has an expectancy of continued employment be deprived of that expectancy by mere ceremonial compliance with procedural due process."[10]

The First Circuit solution to the question of due process rights of nontenured teachers effectively compromised the interests involved: the teacher upon nonrenewal can demand a statement of reasons but not a hearing.[11] The result, although commendable in that it imposes the least possible burden on the administration while simultaneously granting the teacher at least some indication of the cause of his dismissal, leaves unanswered the question of

4. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 n.6 (1972).
5. 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972). See notes 83-90 and accompanying text *infra*.
6. 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).
7. 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).
8. Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947).
9. Pred v. Bd. of Public Instruction, 415 F.2d 851 (5th Cir. 1970).
10. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).
11. Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

whether the status of a nontenured teacher, standing alone, merits constitutional protection. To that question, the Supreme Court has answered an equivocal no.[12]

I. Supreme Court Decisions

In view of the seemingly disparate decisions[13] by the Court in *Roth* and *Sindermann*, both decisions will be analyzed in detail, including the prior history of each case as it relates to the subsequent decisions. Because the decisions are most easily explained in relation to each other, the discussion of the final determination has been relegated to a separate section. In addition, earlier cases that serve to elucidate the two principal cases will be mentioned.

A. *Board of Regents of State Colleges v. Roth*

In *Roth*, the respondent, David Roth, was a political science professor at Wisconsin State University—Oshkosh. Roth's "contract" consisted of a letter notifying him of his appointment to the faculty for the academic year. The notice further provided that the appointment was subject to Wisconsin tenure laws[14] then in effect and that "[t]he employment of any staff member shall not be for a term beyond June 30th of the fiscal year in which the appointment is made."[15] Roth's appointment was his first on the faculty. During the course of the year, Roth made statements critical of the university administration and was subsequently notified that his contract would not be renewed. Although the terms of the contract regarding nonrenewal were complied with, Roth was given "no reason for the decision and no opportunity to challenge it at any sort of hearing."[16]

Roth filed suit in district court, seeking declaratory relief, in the form of a required hearing, and court-ordered reinstatement.[17] Among other contentions, Roth alleged that his first, fifth and fourteenth amendment[18] rights had been violated because the

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12. *See* notes 44-79 and accompanying text *infra*.

13. *See* notes 2-3 and accompanying text *supra*.

14. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 566 nn. 1 & 2 (1972). The Wisconsin statute construed by the Court, Wis. Stat. § 37.31 (1965), read as follows:

> (1) All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher.

Under the present version of the statute, the requisite service is extended to six years. Wis. Stat. § 37.31 (Supp. 1972), *amending* Wis. Stat. § 37.31 (1965).

15. 408 U.S. at 566 n.1.

16. *Id.* at 568.

17. Roth v. Bd. of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis. 1970).

18. U.S. Const. amend. I. "Congress shall make no law . . . abridging freedom of speech. . . ." U.S. Const. amend. V. "No person shall . . . be

nonrenewal was occasioned by the exercise of first amendment freedoms and the lack of a statement of reasons and a hearing deprived him of his due process rights.[19] On competing motions for summary judgment, the court granted partial relief to Roth by ordering a statement of reasons and a hearing "because said decision[to terminate] was not made under ascertainable and definite standards. . . ."[20] Thus at an early stage in the proceedings the constitutional question of dismissal for the exercise of protected freedoms was subordinated to the procedural issue, the question that ultimately reached the Supreme Court.

The district court utilized the balancing test dictated by *Cafeteria Workers v. McElroy*[21] and decided the interests in the situation presented were weighted in favor of the plaintiff, although not without an element of judicial uncertainty.[22] The court's principal concern was the consequence to the career of professors arbitrarily dismissed for causes that may be "wholly without reason."[23] The court thus concluded:

> Minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. . . . Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are appropriate or that they have a basis in fact.[24]

It is of interest to note that even under this ruling in favor of the teacher, the burden of proof cast upon him would render any criticism substantiated by the university an adequate cause for dis-

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deprived of life, liberty or property without due process of law. . . ." U.S. CONST. amend. XIV, Section 1. "[N]or shall any state deprive any person of life, liberty or property, without due process of law. . . ."

19. 310 F. Supp. at 974.

20. *Id.* at 983.

21. 367 U.S. 886 (1960).

22. Commenting on the colleges' interests, the court stated:

> If the university is forbidden, constitutionally, to rest its decision on such an arbitrary basis, the question arises: in practice will the university become so inhibited that the available spectrum of reasons in the two situations [tenure and nontenure] will merge, the distinction between tenure and absence of tenure will shrink and disappear and the university will be unable to rid itself of newcomers whose inadequacies are promptly sensed but not easily defined? It will not do to ignore this danger to the institution and to its central mission of teaching and research.

310 F. Supp. at 979.

23. *Id.*

24. *Id.* at 980.

missal. The defendant in its answer had alleged that the decision to terminate had been based, *inter alia*, on "violation of duty, violation of university rules, and insubordination. . . ."[25] Thus had a hearing been held, it would appear that the plaintiff would be a rare professor indeed if the Regents could not have shown, at a minimum, some violation of university rules. Would such a showing be sufficient, particularly if the professor was one whose "inadequacies are promptly sensed and grave but not easily defined?"[26] The court leaves unanswered the minimum criteria for contract termination, in large part due to its attempt to prohibit an unconstitutional dismissal while preserving the considerable latitude[27] of college administrators to dismiss teachers whose main fault is educational ineptitude, incidentally augmented by anti-administration exercises of free speech. The judicial reconciliation of these two viewpoints is a problem common to most cases dealing with the due process rights of dismissed teachers.

The court of appeals affirmed the decision,[28] with Senior Circuit Judge Duffy dissenting. The majority primarily restated the district court reasoning while admitting that Supreme Court decisions left the issue unresolved.[29] The court of appeals did add a further reason for the necessity of a statement of reasons and a hearing, *i.e.*, "as a prophylatic against non-retention decisions improperly motivated by exercise of protected rights."[30]

Judge Duffy's dissent is of particular importance because of the similarity of his reasoning to the Supreme Court's ultimate rationale. He concluded:

> [T]he State's interest in preserving a workable system of tenure which includes, almost by definition, the ability to select freely and maturely its non-tenured teaching personnel, far outweighs any expectancy David Roth might have had in continued employment at Wisconsin State University.[31]

The dissent underscores the futility of a hearing since the professor, receiving an adverse result, "will, quite naturally, seek relief in the federal courts and . . . will feel free to ignore all the proceedings that have transpired before."[32] In addition, Judge Duffy, taking judicial notice of the buyer's market in teaching talent, commented upon the unnecessary burden that will be placed on the colleges if they must grant hearings before dismissal while in the process of "upgrading their younger faculties by extensive substitutions as

25. *Id.* at 974.
26. *Id.* at 979. *See* note 22 *supra.*
27. 310 F. Supp. at 978.
28. Roth v. Bd. of Regents of State Colleges, 446 F.2d 806 (7th Cir. 1971).
29. *Id.* at 809.
30. *Id.* at 810.
31. *Id.* at 814.
32. *Id.* at 811.

better qualified applicants become plentiful."[33] From the court of appeals decision, the Supreme Court granted certiorari.[34]

B. *Perry v. Sindermann*

In *Sindermann*, the respondent, Robert Sindermann, was a professor of Government and Social Science at Odessa Junior College in Texas. Sindermann had taught in the Texas state college system for ten years, the last four at Odessa during successive one-year contracts. Odessa Junior College had no tenure system, although there was a faculty-administration "understanding."[35] During his fourth year, Sindermann was elected president of the Texas Junior College Teachers Association, a position which necessitated various trips to testify before the legislature during normal class time. In addition, he advocated the academic expansion of Odessa Junior College into a four-year institution, a change opposed by the administration. In May of his last year, Sindermann was informed that this contract would not be renewed. The Board of Regents issued a press release detailing his alleged insubordination, but they provided Sindermann with "no official statement of the reasons. . . . And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal."[36]

Sindermann brought suit in District Court alleging violations of his constitutional rights to freedom of speech and due process. He sought damages, compensatory and punitive, and reinstatement. The court granted defendants' motion for summary judgment.[37]

On appeal, the court of appeals reversed.[38] The court, in accordance with prior Fifth Circuit decisions,[39] remanded the case for a determination of whether the professor had an "expectancy

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33. *Id.* (footnote omitted).
34. 404 U.S. 909 (1971).
35. This "understanding" consisted primarily of a provision, termed "unusual" by the Court, in the Faculty Guide:

> Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy with his work.

Perry v. Sindermann, 408 U.S. 593, 600 & n.6 (1972). In addition, the respondent alleged reliance on the tenure guidelines promulgated by the Texas governmental unit responsible for the state colleges and universities.
36. 408 U.S. at 595.
37. The district court decision is not officially reported. The findings and conclusions are noted in Sindermann v. Perry, 430 F.2d 939, 942 & n.7 (5th Cir. 1970).
38. Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).
39. *See* notes 8-10 and accompanying text *supra*.

of employment under the policies and practices of the institution."[40] If the court below so found, it was to order notice of the reasons for dismissal and a hearing to the professor.[41] The court, as did the district court in *Roth*[42] exhibited a degree of judicial uncertainty as to the effect of the due process requirement on the discretionary powers of the school administration, stating:

> A requirement such as plaintiff suggests, that a college must always assign a cause for not renewing the contract of any teacher on its staff, would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any reemployment obligation. Every teacher would thus be granted substantial tenure rights by court edict.[43]

On appeal by the college, certiorari was granted by the Supreme Court.[44]

C. *Analysis of the Supreme Court Decisions*

The Supreme Court heard the cases together, reversing the *Roth* decision[45] and affirming the *Sindermann* decision,[46] although not on the grounds propounded by the Fifth Circuit Court of Appeals. While the decisions may initially appear to reach opposite results, they can be reconciled. *Roth* falls within the general rule that "the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract. . . ."[47] *Sindermann* is an example of one of the manifold exceptions which arise when a teacher "can show that the decision not to rehire him deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract."[48] The best summation of the two decisions is found in *Sindermann*, as follows:

> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision *may not always* foreclose the possibility that a teacher has a "property" interest in reemployment.[49]

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40. 430 F.2d at 943 (citation omitted).
41. *Id.* at 944.
42. *See* note 22 and accompanying text *supra.*
43. 430 F.2d at 944.
44. 403 U.S. 917 (1971).
45. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Lower court decisions of the same case are discussed at notes 15-34 and accompanying text *supra.*
46. Perry v. Sindermann, 408 U.S. 593 (1972). Lower court decisions of the same case are discussed at notes 35-44 and accompanying text *supra.*
47. Perry v. Sindermann, 408 U.S. 593, 599 (1972).
48. *Id.*
49. 408 U.S. at 601 (emphasis added).

As is evident, the court was reluctant to resolve the problem with any strict guidelines. The central concern was the property interest of the teacher. The court decreed that in the majority of cases the property interest vested in the nontenured teacher is inadequate to give rise to a statement of reasons and a hearing. The exceptions hereinafter discussed must be evaluated in light of the above quotation.

Dismissing first the subordinate issue presented in the cases—whether a teacher may be fired for exercising first amendment freedoms—the Court answered a qualified no. It did hold that the question of tenure was not pertinent to the first amendment question,[50] but nevertheless refused to give a blanket response, repeating its earlier holding that a "teacher's public criticism of his superiors . . . *may* . . . be an impermissible basis for termination of his employment."[51]

Turning to the central issue in the cases, the due process rights of nontenured professors upon dismissal or nonrenewal of their contracts, the Court enumerated various exceptions to the general rule quoted above. The exceptions can be generally classified as follows:

(1) deprivation of liberty
  (a) damage to reputation
  (b) employment stigma
(2) breach of contract
  (a) term of contract
  (b) implied contract
(3) noncompliance with state law, in particular tenure and rights thereunder.

As can be seen, classifications (2) and (3) are concerned with the property rights of the teacher. Furthermore, there is inevitable variation depending upon each state's laws of contract. Never-

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50. *Id.* at 597-98.

51. *Id.* at 598 (emphasis added). The Court cites Pickering v. Bd. of Educ., 391 U.S. 563 (1968) as support for this proposition, presumably referring to the balancing test therein. The magazine of the National Education Association hails this statement as a judicial decree to the effect that "teachers may not be denied a new contract because they have exercised a right secured by the first amendment to the Constitution," failing to mention when that right may not be so secured. TODAY'S EDUCATION, Sept., 1972 at 37. It would more realistically appear that the state of the law remains as in Pred v. Bd. of Public Instruction, 415 F.2d 851, 857 (5th Cir. 1970), wherein Circuit Judge Brown stated:

> [W]e must yet answer the broad question stated above . . . whether state created status may be denied because of First Amendment activities. And the answer has to be: maybe yes, maybe no.

theless, the classifications do afford convenient guidelines for exposition of the Court's reasoning.

On the issue of deprivation of liberty, the Court implies that the instances of due process requirements being necessitated by such an infringement will be rare.[52] For example, the Court states that "the interest in holding a teaching job at a state university, *simpliciter*, is not itself a free speech interest."[53] However, two general areas are presented where the deprivation of liberty would invoke due process requirements. The first is aimed at the situations where the state makes any charge against the professor "that might seriously damage his standing and associations in his community."[54] Even if the hearing is then required, however, the employer "may remain free to deny him future employment for other reasons."[55] Given the general holding of the cases, this exception is relatively meaningless in terms of a professor retaining his job. The charge could be made, the employee could refute the charge before university officials, the employee's contract could be nonrenewed for "other reasons."[56] The exception, however, does raise an interesting question whether a professor whose contract is not renewed, at a time coincident with the making of unfounded aspersions about his character, may demand a hearing to refute the charges. Since the state did not make any charge,[57] the answer would probably be no.

The other liberty exception is more complex: the state cannot impose on the professor "a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."[58] Read superficially, the exception appears to open the door to a due process requirement founded simply on nonrenewal, in that any such action could be expected to attach dubious connotations to the professor's past employment record. The Court, however, limits this generality by further adding:

> Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty.[59]

Even with this limitation, however, the exception is open to several interpretations. For instance, if the job in question had been his second dismissal, would nonretention in two jobs impose a

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52. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972).
53. *Id.* at 575 n.14.
54. *Id.* at 573.
55. *Id.* at 573 n.12.
56. *Id.*
57. *Id.* at 573.
58. *Id.*
59. *Id.* at 574 n.13 (citation omitted).

stigma such that the second employer owed the professor a statement of reasons and a hearing? Three jobs? Would notification of nonrenewal in June for the coming school year "foreclose a range of opportunities"?[60] Furthermore, the Court discreetly reprimands the district court for its assumption that nonrenewal has a substantial adverse effect on career plans, and adds that "the record contains no support for these assumptions."[61] Conjecturally, the best support for such assumptions would be offered by the worst professor, in that he could offer as proof numerous job rejections, allege that the rejections were due to the stigma of nonrenewal, and ask the court for due process rights. The natural conclusion to be drawn is that this exception requires more than mere nonrenewal, and in fact is closer to the first exception discussed, nonrenewal coupled with a charge against the professor.[62]

Under the contract law exceptions, the Court reaffirms earlier decisions mandating due process requirements for those in the public employ under the following conditions: (1) professors dismissed after securing tenure;[63] (2) professors dismissed during the terms of their contracts;[64] and (3) professors dismissed without tenure or contract, but with a "clearly implied promise of continued employment."[65] This last exception deserves consideration, for the case in support involved a teacher hired for a full-time position during the school year and fired shortly thereafter for failure to take a loyalty oath. The clear implication is that any full-time teacher dismissed during the academic term is entitled to a statement of reasons and a hearing, even without a contract or tenure, unless state law[66] or the particular contract with that teacher decrees otherwise. Such a requirement seems but another facet of the earlier discussed deprivation of liberty, for a mid-term dismissal clearly stigmatizes a teacher much more than mere nonrenewal.

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60. *Id.* at 574. The question may have been impliedly answered by the Court. Note the date of Sindermann's dismissal—May, notes 35-36 and accompanying text *supra*—a factor ignored by the Court in its disposition of the case.

61. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 574 n.13 (1972).

62. *See* notes 52-57 and accompanying text *supra.*

63. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576 (1972) *citing* Slochower v. Board of Educ., 350 U.S. 551 (1956). *See* note 81 *infra.*

64. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-77 (1972) *citing* Wieman v. Updegraff, 344 U.S. 183 (1952). *See* note 81 *infra.*

65. Board of Regents of State Colleges v. Roth, 408 U.S. 504, 577 (1972) *citing* Connell v. Higginbotham, 403 U.S. 207 (1971). *See* note 81 *infra.*

66. *See* notes 73-76 and accompanying text *infra.*

The implied contract exception was the deciding factor in the *Sindermann* case. Without holding as a matter of law that *Sindermann* had a "legitimate claim of entitlement to job tenure,"[67] in turn requiring a statement of reasons and a hearing, the Court did remand the case for a determination of whether Sindermann could prove such a claim.[68] The policy paper[69] suggesting that Odessa Junior College had a system of de facto tenure was determinative. In citing 3 *Corbin on Contracts*, §§ 561-672A[70] to exemplify those instances when a property interest could arise by implication, the Court may have introduced numerous litigation possibilities. Any such instances, however, must be evaluated within the circumspection provided by the Court:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[71]

In addition, the Court specifically rejects the Fifth Circuit's emphasis on a mere "expectancy of continued employment."[72] Regardless of the strictures placed by the Court on this exception, it could safely be predicted that the issue of implied contracts will be the foundation of most future cases because of the possibilities under this theory. For instance, most teachers will be informed upon hiring that they can expect tenure in a certain amount of time, either by statute or institutional policy. It is submitted that such a statement implies no more promise of continued employment for that period of time than does the explanation of pension plans to the management trainee.

In any event, the final determination of whether an interest, contractual or otherwise, rises to the level of a property interest is left by the Court to the states.[73] Chief Justice Burger, in an opinion concurring with both decisions,[74] even urges federal courts to abstain from any determination of state-defined property rights "[i]f relevant state contract law is unclear. . . ."[75] Obviously, the states will in most instances define eligibility for tenure. In the present cases, Wisconsin statutes[76] were complied with in the Roth nonrenewal. In Sindermann's position, no such statutes were applicable, so the institutional practices became paramount. Subse-

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67. 408 U.S. at 602.
68. *Id.* at 603.
69. *See* note 35 *supra.*
70. 408 U.S. at 602.
71. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).
72. Perry v. Sindermann, 408 U.S. 593, 603 (1972).
73. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).
74. Perry v. Sindermann, 408 U.S. 603 (1972).
75. *Id.*
76. *See* note 14 and accompanying text *supra.*

quent cases will thus be decided on the issue of relevant state law, an exposition of which will not be attempted herein.

In addition to a unilateral expectation of a property right being insufficient to invoke due process requirements,[77] the Court mentions several other occasions when the proof will fall short of that necessary to even consider one of the exceptions. For instance, a "mere showing that [the teacher] was not rehired on one job, without more, [does] not amount to a showing of a loss of liberty . . . [or] loss of property."[78] Also the suggestion by the Fifth Circuit Court of Appeals that a professor may demand due process if he simply asserts that the nonrenewal was based on constitutionally impermissible grounds is explicitly rejected.[79]

Broadly, the Supreme Court in *Roth* and *Sindermann* has denied the *automatic* right to a statement of reasons and a hearing to any nontenured professor under state auspices whose contract has not been renewed. Given the inherent conflict between the discretionary powers necessary in any employer-employee relationship and the right to pursue constitutionally protected freedoms, particularly when the employer is the state, the decisions reflect an effective compromise. Because of the exceptions,[80] the decisions will, at a minimum, clarify the issues that will be central in future cases involving the due process rights of nontenured teachers.

D. *Earlier Cases*

Earlier cases used by the Court in support of the *Roth* and *Sindermann* decisions concerned peripheral issues.[81] Cases on the

77. *See* note 71 and accompanying text *supra.*

78. Perry v. Sindermann, 408 U.S. 593, 599 (1972).

79. *Id.* at 599 n.5; Board of Regents of State Colleges v. Roth, 408 U.S. 564, 575 n.14 (1972).

80. *See* notes 51-75 and accompanying text *supra.*

81. Previous cases serving as the most useful analogy concerned state denial of employment for reasons offensive to the first amendment. For instance, Pickering v. Bd. of Township High School Dist., 391 U.S. 563 (1968) (published criticism of administration officials); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (refusal to sign certificate disavowing communism); Shelton v. Tucker, 364 U.S. 479 (1960) (required disclosure of organizations to which teacher belonged); and Wieman v. Updegraff, 344 U.S. 183 (1952) (failure to take loyalty oath) were all cited in support of the "general principle" that the state "may not deny a benefit to a person on a basis that infringes upon his constitutionally protected interest—especially, his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593, 596 (1972). Two other cases used by the Court throughout the decisions concerned fifth amendment privileges (Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956)), and due process rights accruing to a teacher dismissed during the school term (Connell v. Higginbotham, 403 U.S. 207 (1971)).

nonrenewal issue preceding the decisions were lower court decisions, some of which have been previously discussed.[82] Several other such cases bear mention either because of the result reached prior to *Roth* and *Sindermann* or because the fact situations afford a convenient vehicle for a projection of future results.

The most important lower court decision concerning the issue is *Orr v. Trinter*,[83] for the following reasons: (1) the case presents a cogent summation of the law as it stood before the Supreme Court determination; (2) the reasoning closely parallels that of the Supreme Court; and (3) certiorari was denied the same day *Roth* and *Sindermann* were handed down. The importance of a denial of certiorari is legally debatable, but nevertheless lower courts do take careful note of such action[84] and the case could have as easily been remanded for further proceedings consistent with *Roth* and *Sindermann* (as was done the same day with a case granting reasons and a hearing to a dismissed probationary teacher)[85] if in fact the case were inconsistent.[86] In addition, the case was cited by the Supreme Court to support the proposition that some lower courts have held that no procedural safeguards are required,[87] a clear demonstration of the Supreme Court's interpretation of the holding. Furthermore, the similarity of the court's rationale to the Supreme Court's ultimate determination provides an additional reason for elevating the denial of certiorari to affirmation sub silentio.

The court of appeals in *Trinter* denied the benefits of a statement of reason and a hearing to a probationary high school teacher whose contract was not renewed, reasoning as follows:

> [I]n the unique situation of a probationary school teacher, the failure to give reasons for the refusal to rehire is not arbitrary and capricious action on the part of the Board since the very reason for the probationary period is to give the Board a chance to evaluate the teacher without making a commitment to rehire him. A nontenured teacher's interest in knowing the reasons for the nonrenewal of his contract and in confronting the Board on those reasons is not sufficient to outweigh the interest of the Board in free and independent action with respect to the employment of probationary teachers.[88]

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82. *See* notes 4-11 and accompanying text *supra*.
83. 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).
84. *See, e.g.*, Shields v. Watrel, 336 F. Supp. 260, 263 (W.D. Pa. 1971).
85. Thomas v. Shirck, 408 U.S. 940 (1972) (remanded for proceedings consistent with *Roth*).
86. For a general discussion of the importance of a denial of certiorari, *see* Honus, *Denial of Certiorari and Supreme Court Policy-Making*, 17 AM. U.L. REV. 41 (1967).
87. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569 n.6 (1972).
88. 444 F.2d at 135.

The nonrenewal was in accordance with the Ohio statute,[89] a factor that cannot be ignored in any analysis of the reason for the denial of certiorari.[90] The court refused to "amend the Ohio statute by judicial decree" to "confer certain tenure privileges upon nontenured teachers. . . ."[91] Under the *Roth* and *Sindermann* rationale, no change would be expected in situations similar to this.

In *Henry v. Coahama County Board of Education*,[92] another lower court decision of note, the teacher involved had been employed in the same school district for eleven years. There were no tenure provisions. To be rehired, the teacher needed the recommendation of the County Superintendent. Since the recommendation was refused, the teacher sought an injunction requiring a new contract, alleging that the nonrenewal was based at least in part on involvement with the National Association for the Advancement of Colored People. The district court upheld the discretionary power of the County Superintendent not to renew without a hearing or statement of reasons. Under the *Roth* and *Sindermann* approach, the teacher would seem to be eligible to contend that a de facto tenure system existed, or, alternatively, that the expectation of continued employment was more than merely unilateral after eleven successive contracts. It remains to be seen whether de facto tenure can be acquired by mere longevity alone, absent any explicit representations as were present in *Sindermann*.[93] The issue of an objective expectation of continued employment would probably involve a factual determination concerning, among other factors, the number of people with over ten years' employment who are not rehired annually and the statute involved. Because of the Supreme Court's stated propensity to follow state law[94] in such situations, however, the final result may be a Pyrrhic victory: a court-ordered statement of reasons and a hearing but an upholding of the statutory scheme for dismissal. This type of situation can be expected to arise in future litigation involving non-teachers em-

89. *Id.* at 130. The court applies the pertinent Ohio statute, OHIO. REV. CODE ANN. § 3319.11 (1971), a provision similar to applicable Pennsylvania statutes; *see* notes 97-105 and accompanying text *infra*. Under the Ohio statute, a teacher is deemed re-employed unless notified to the contrary. It is of interest to note that the court, while not explicitly addressing the issue, made no mention of any promise of continued employment implicit in such a provision. *See* notes 62-71 and accompanying text *supra*. *See also* notes 126-132 and accompanying text *infra*.

90. *See* notes 73-76 and accompanying text *supra*.

91. 444 F.2d 128, 135 (6th Cir. 1971).

92. 246 F. Supp. 517 (N.D. Miss. 1963), *aff'd*, 353 F.2d 648 (5th Cir.), *cert. denied*, 384 U.S. 962 (1966).

93. *See* note 35 *supra*.

94. *See* notes 73-76 and accompanying text *supra*.

ployed by a state-controlled institution such as secretaries at a state college. Without any controlling tenure provisions, the question of whether such employees can demand a statement of reasons and a hearing will be determined by the point in time that they acquire an objective expectancy of continued employment.

In such situations, the comparison to teachers may present a legal anomaly. If a state college has very explicit tenure provisions which grant tenure upon reaching the seventh year of continued employment, and further negative any expectancy of continued employment prior to that time, a professor fired after six years would have no recourse to a statement of reasons or a hearing under *Roth* and *Sindermann* (assuming no other conditions). A secretary dismissed after six years, however, may be able to prove that no secretaries were ever fired who worked longer than five years, therefore she had a legitimate claim of entitlement to continued employment. The college at that point would be found to have violated constitutionally required due process protections, and she would be entitled to the appropriate remedies.[95] In such situations, the lack of explicit tenure provisions to negate any implied promises may be fortuitous for the employees involved.

II. Pennsylvania Effect

In light of the Supreme Court's emphasis on applicable state law as the ultimate measure of property rights in any individual case,[96] the pertinent law of Pennsylvania will be examined. A survey of prior law is helpful in this regard, but somewhat deficient because the law on the question of due process rights of nontenured teachers was seldom litigated along the same issues as those that proved central to the Supreme Court determination. Chief among those issues is the problem of implied contracts,[97] the nature of which can be as varied as the facts in any case. It is hoped, however, that present statutes and prior cases on related issues will serve as some indicia of future results.

A. *Statutes*

Pennsylvania statutory law applicable to teachers in public schools and state-controlled universities is not uniform. In public schools, tenure is explicit and controlled completely by the relevant statutes;[98] in state colleges and universities, complete discretion is left to the individual universities and the state departments under which they operate.[99] Although courts have had no insurmounta-

95. *See, e.g.*, Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969) (teacher granted reinstatement and back pay).
96. *See* notes 73-76 and accompanying text *supra*.
97. *See* notes 63-72 and accompanying text *supra*.
98. Pa. Stat. Ann. tit. 24, §§ 11-1101 to -1194 (Supp. 1972).
99. Pa. Stat. Ann. tit. 24, §§ 20-2003.1 to -2008.3 (Supp. 1972).

ble problems implementing the statutes, the draftsmanship has been classified as careless and inarticulate by at least one court.[100]

Nontenured public school teachers are, for statutory purposes, "temporary professional employees."[101] These teachers must be rated at least semi-annually, and if found satisfactory throughout the two-year probationary period, the teacher becomes a "professional employe," and tenure is acquired.[102] Prior to the acquisition of tenure, the teacher may be dismissed for an unsatisfactory rating, but must be furnished with a written notification of the rating.[103]

Roth and *Sinderman* should have little effect on the statutory scheme for tenure at public schools. If anything, because of the Court's concern with state law, and since the Pennsylvania statutory law quite explicitly establishes the criteria for the attainment of tenure, the cases should merely buttress the obvious: no objective property right to the status of a temporary professional employee can vest before tenure is acquired. The Pennsylvania statutes in implementation differ little from the statute under consideration in *Roth*,[104] except that Pennsylvania requires notification for an unsatisfactory rating.[105] Given the state tenure law and the *Roth* decision, nontenured public school teachers who are dismissed in accordance with the statute should find little recourse to further due process considerations.

Contrary to the state-controlled tenure in public schools, state-related universities are given broad mandates to establish their own tenure policies.[106] In lieu of state statutes governing tenure, the policies of the individual institution or the contracts made by that institution with its faculty become paramount.

B. *Prior Cases*

Pennsylvania law, as construed by the courts, has granted few due process rights to nontenured professors in excess of those granted by statute.[107] Of primary importance because of its direct bearing on the question of the due process considerations owed to

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100. Johnson v. United School Dist. Joint School Bd., 201 Pa. Super. 375, 381, 191 A.2d 897, 901 (1963).
101. PA. STAT. ANN. tit. 24, § 11-1101(c) (Supp. 1972).
102. PA. STAT. ANN. tit. 24, § 11-1108(b) (Supp. 1972).
103. *Id.* at § 11-1108(c).
104. *See* note 14 *supra.*
105. *See* note 103 and accompanying text *supra.*
106. *See* note 99 and accompanying text *supra.*
107. *See, e.g.,* Shields v. Watrel, 333 F. Supp. 260 (W.D. Pa. 1971).

a nontenured professor is the case of *Shields v. Watrel.*[108] The district court in that case stated:

> As a non-tenured professor, Mr. Shields is essentially a probationary state employee. Too, the analogy extends to the state which has an important interest in staffing its state colleges and universities with the most competent available professors. Indeed, that interest would seem to underlie the traditional system of tenure. To infringe upon the discretion of the state higher education officials in deciding which of its nontenured professors or instructors should be retained and which should be released by requiring an administrative hearing for every release would be to unnecessarily burden the administration of the state higher education system. Certainly the state must be free to exercise its discretion, indeed its duty, to retain or grant tenure only to those professors who in the unfettered judgment of the state officials merit retention or tenure without having to endlessly record reasons for terminating the employment of those who are not retained or granted tenure. Otherwise, the courts would clothe all untenured teachers with the important incidents of tenure and thereby emasculate the system.[109]

Because of the relatively little extra-statutory difference between nontenured state college professors and public school teachers,[110] the decision should apply to public school teachers also. The decision is strengthened by the parallels between the court's reasoning and the reasoning in *Roth* and *Sindermann.*

In *Grausam v. Murphy,*[111] the Third Circuit Court of Appeals was confronted with a situation similar to that of the nontenured teacher: a probationary state employee at a state hospital was dismissed and one of his subsequent contentions concerned the right to a statement of reasons and a hearing prior to dismissal. The analogies between the probationary state employee and the probationary school teacher are several, including the applicable statutes and the dismissal procedures.[112] The court upheld the power of the administrators to dismiss the employee on the basis of the considerable interest of the state "in obtaining employees who satisfactorily provide the important public services performed by it, and in replacing those who do not. . . ."[113] Regarding the interest of the employee, the court stated:

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108. *Id.*
109. *Id.* at 264.
110. Id. at 263 n.5:
"Teacher" here is used loosely and generically to mean educators from university professors to grammar school teachers, there being for present purposes no legal distinction.
111. 448 F.2d 197 (3d Cir. 1971).
112. *Compare* PA. STAT. ANN. tit. 71, § 741.603 (Supp. 1972) *with* PA. STAT. ANN. tit. 24, § 11-1108 (Supp. 1972). In both instances dismissal is possible for unsatisfactory performance, although the measuring standard is more flexible in the former.
113. 448 F.2d at 206.

> By the very fact that he was on probation, his eligibility and right to hold his position were in the process of determination. Any interest in or right to his post during probation was at best conditional, and, absent a discriminatory severance, dependent upon his own performance in proving his ability to successfully satisfy the demands of that position.[114]

This decision and the decision in *Shields v. Watrel* illustrate that federal court decisions applying Pennsylvania law were in accord with the subsequent admonitions of *Roth* and *Sindermann;*[115] few due process rights were found other than those specified by statute. There would be little cause to expect further relaxation of the court's stance after the Supreme Court decisions.

In state courts, two decisions merit consideration. The most recent is *Nicolella v. School Board of the Trinity Area School District, Washington County.*[116] In that case, a school teacher sought a mandamus order requiring reinstatement because of "bad faith and disregard of the requirements of the School Code"[117] on the part of the Board. The teacher had been given a hearing, a fact which the court cited as exemplifying the Board's fairness because of the lack of any such requirement.[118] The teacher had been rated unsatisfactory, a factor which the court stated "is the *only* prerequisite necessary for dismissal by the Board absent a showing of bad faith or arbitrary and capricious action on the part of the Board."[119] The teacher had contended that the hearing was invalid. Judge McCune, presiding at the lower court determination, was even more succinct in his appraisal of such a contention:

> Our understanding of the law is that once rated unsatisfactory he is not entitled to a hearing upon dismissal so the validity of the hearing which was granted is inconsequential. Failure to hold a hearing does not violate the due process clause of the Constitution of the United States or of Article 1, Section 9 of the Pennsylvania Constitution where temporary professional employees are concerned.[120]

In the case the courts used as support for the preceding opinions, the appellant, a temporary professional employee, alleged that the denial of a hearing prior to dismissal was a violation of due

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114. *Id.*
115. *See* notes 45-49 and accompanying text *supra.*
116. 444 Pa. 541, 281 A.2d 832 (1971).
117. *Id.* at 548, 281 A.2d at 834.
118. *Id.* at 550, 281 A.2d at 835.
119. *Id.* (emphasis added) (citation omitted).
120. Nicolella v. School Bd. of Trinity Area School Dist., 49 Wash. Co. 1, 3 (Pa. C.P. 1968).

process.[121] The court, construing the school code, held that there was "no provision in this statute authorizing or providing for a hearing for a temporary teacher *who desired to obtain permanent status. . .*"[122] and further that without any such requirement "plaintiff had no property or other vested right in or to the position of status of a permanent teacher."[123] This holding will be a fundamental source of legal authority for any future litigation based on *Roth* and *Sindermann*, for the court identifies (1) the unilateral expectation of a teacher in her attainment of permanent status,[124] and (2) the lack of a property right in the desire to attain tenure.[125]

C. *Pennsylvania Law in Regard to the Exceptions*

Having established by case law and statutory authority that the nontenured teacher has no automatic right to a statement of reasons or a hearing upon nonrenewal of his contract,[126] the various exceptions enunciated by the Supreme Court must be examined to determine their applicability in Pennyslvania cases. No discussion of the deprivation of liberty exception will be presented, as such cases are peculiarly adapted to the facts in each case.

Because of the myriad types of implied contracts, it is submitted that the majority of future cases will center on this issue. Implied contracts are of such a diverse nature that only those based on applicable statutes will be presented. It is admitted that many varieties of implied contracts may be raised in any employer-employee relationship. It is hoped, however, that by a discussion of one such contention the general issues applicable to others will be, if not disposed of, at least brought to light.

Presumably the contract of employment will specify that the terms of the contract are subject to the temporary professional employee statutes,[127] in cases involving public school teachers. Given such a reference, the contention will probably be raised that the implied duration of the contract is concomitant with the length specified in the statutes, *i.e.* two years (even though the contract is a one-year contract), and that furthermore the teacher has an objective expectancy of continued employment until that time. Should the court accept such a syllogism, the teacher, now possessed of the requisite objective expectancy,[128] deserves a statement

121. Travis v. Teter, 270 Pa. 326, 87 A.2d 177 (1952).
122. *Id.* at 337, 87 A.2d at 182 (emphasis added).
123. *Id.*
124. *See* note 71 and accompanying text *supra.*
125. *See* notes 51-52 and accompanying text *supra.*
126. *See* notes 96-125 and accompanying text *supra.*
127. *See, e.g.,* Johnson v. United School Dist. Joint School Bd., 201 Pa. Super. 375, 191 A.2d 897 (1963). *See also* notes 98-106 and accompanying text *supra.*
128. *See* notes 67-72 and accompanying text *supra.*

of reasons and a hearing, even without any statutory requirements. This argument rests on the assumption, however, that an incorporated reference to a statute, in which a length of time is specified, is sufficient to imply employment for that length of time. The fallacy in the argument is found in *Corbin on Contracts*, used by the Supreme Court[129] to allow the implied contracts exception in provable instances:

> [W]here the parties have made an express contract, the court should not find a different one by "implication" concerning the same subject matter, if the evidence does not justify an inference that they intended to make one.[130]

Given a one-year contract and a two-year statutory period, an inference that the parties impliedly contracted for two years would be unsupportable.[131] Nevertheless, the point has been raised, and dismissed, in predictable fashion:

> The language appears clear that a 10-month term was contemplated and the provision regarding the continuation for two years is declaratory of section 1108 of the school code regarding eligibility for tenure by a temporary professional employee. We believe this does not contradict the clear language of the contract indicating the duration thereof.[132]

If in fact the contract of employment stated *no term* but did incorporate a reference to the school code, a dubious situation, the contention could be raised that the implied term was for the two-year period specified in the statute as the length of temporary professional employee status. Against such an implication would be the argument that any teaching contract without a stated duration implies continued employment for the length of the school year only, an argument not only more feasible but supported by the Supreme Court.[133]

The Superior Court of Pennsylvania has held that a contract in which the annual compensation for the academic year was stated, subject to the provision that the contract could be terminated by either party with eighty days' notice, gave the teacher

129. Perry v. Sindermann, 408 U.S. 593, 602 (1972). *See* note 70 and accompanying text *supra*.

130. 3 A. CORBIN, CORBIN ON CONTRACTS, § 564 (2d ed. 1960).

131. In addition to the legal fallibility of the argument, the defining statute further rejects the inference by embracing only those teachers employed "for a limited time." PA. STAT. ANN. tit. 24, § 11-1101(c) (Supp. 1972).

132. Goodwin v. Centre County Bd. of Educ., 55 Pa. D. & C.2d 134 (C.P. Centre, 1970).

133. Connell v. Higginbotham, 403 U.S. 207 (1971), *as construed in* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (by implication).

"no affirmative right to employment throughout that period [the academic year]."[134] Thus the Pennsylvania courts that have confronted the issue of implied contracts in teachers' contracts are in accord with both Corbin's circumscriptions[135] and the presumed intent of the Supreme Court to restrict the use of the implied contracts exception.[136]

Because of the restrictions on implied contracts in teachers' contracts,[137] it can be expected that more faculties and administrations will desire an express delineation of the due process rights of the teachers. With the advent of collective bargaining by faculties, the natural result would be to place such provisions in the negotiated contracts. At the present public school level, little protection in the form of due process rights is given the nontenured teacher beyond that provided by law even in such negotiated contracts.[138]

At the college level, however, one such contract is particularly important because of the number of state-controlled universities affected by it. The contract, effective November 2, 1971, is between the Association of Pennsylvania State College and University Faculties/Pennsylvania Association for Higher Education and the Commonwealth of Pennsylvania.[139] The contract embraces fourteen state colleges and universities throughout the Commonwealth.[140] The procedure upon nonrenewal is carefully detailed:

> In the event a first year FACULTY MEMBER is denied renewal, the reason for such denial shall be given to the individual in writing, if requested; but he shall have no recourse to the provisions of Article V, hereof, GRIEVANCE PROCEDURE AND ARBITRATION. The FACULTY MEMBER, however, shall retain such rights as may be provided him by law.[141]

Once a faculty member reaches his second year of service, he does have access to the arbitration procedures enumerated in the contract.[142] The elements of the procedure to be followed in the non-

134. Tishock v. Tohickon Valley Joint School Bd., 181 Pa. Super. 278, 280, 124 A.2d 148, 149 (1956).

135. *See* note 130 and accompanying text *supra.*

136. *See* note 71 and accompanying text *supra.*

137. *See* notes 127-133 and accompanying text *supra.*

138. Most such contracts examined by the author establish dismissal procedures but the provisions are generally administrative. In those situations in which the nontenured teacher obtains a contractual right to due process considerations in excess of those provided by law, quite obviously the contract will control.

139. Collective Bargaining Agreement between Ass'n. of Pa. State College and Univ. Faculties/Pa. Ass'n. for Higher Educ. and Commonwealth of Pa. (1971) [hereinafter cited as Bargaining Agreement].

140. The colleges and universities are as follows: Bloomsburg, California, Cheyney, Clarion, East Stroudsburg, Edinboro, Indiana University, Kutztown, Lock Haven, Mansfield, Millersville, Shippensburg, Slippery Rock, and West Chester.

141. Bargaining Agreement, *supra* note 139, at Article XIV, § c.

142. *Id.* at Article V.

renewal of first-year professors deserve mention: (1) the right to a statement of reasons but not a hearing *after* notification of nonrenewal, and (2) the burden of requesting such a statement is upon the individual fired.[143] In the event that the proper nonrenewal procedures are not followed, the teacher's contract is automatically renewed. Given such explicit procedures, it is difficult to envision situations (other than the deprivation of liberty rarities) wherein a dismissed one-year professor at a state college will have any recourse to a claim of due process denial.

Despite the detailed procedures governing those schools affected by the above contract, at the remainder of colleges and universities in the Commonwealth, both state-controlled and private, "there is a general lack of procedure guaranteeing due process in the case of nonreappointment of nontenured faculty."[144] Because each such school is governed by its own particular policies, no composite rule can be established encompassing those situations when a teacher whose contract has not been renewed deserves a statement of reasons and hearing.

Conclusion

The Supreme Court, confronted with the judicial and academic controversy surrounding the nonrenewal of nontenured teachers, has responded by holding that, in the majority of cases, the interest of the institution in staffing its facilities with competent faculty deserves greater protection than the individual professors whose contracts have been terminated. The decisions are compatible with existing Pennsylvania statutory and case law; the effect of the decisions should be negligible in regard to teachers without tenure whose contracts have been terminated.[145]

At the public school level, Pennsylvania should fall within the ambit of the *Roth* decision—no right to a statement of reasons or hearing accrues automatically because of the statutory provisions for nonrenewal.[146] At the higher education level, the presence of a sufficient property interest to invoke due process considerations will depend on the institution involved, although it can safely be assumed that every such institution has some form of explicit ten-

143. *See* note 141 and accompanying text *supra.*

144. Interview with Dr. Wallace H. Maurer, Chief of Division of Faculty Services, Pennsylvania Office of Higher Education in Harrisburg, Pa., September 21, 1972. Numerous faculty guides were exhibited as support for the statement.

145. *Compare* notes 45-80 and accompanying text *supra with* notes 98-125 and accompanying text *supra.*

146. *See* notes 98-106 and accompanying text *supra.*

ure system. If in fact the institution has actual tenure, the claim of de facto tenure should be effectively negated.[147]

Thus any future Pennsylvania litigation on the question of due process rights of nontenured professors will center on the exceptions enunciated in the *Roth* and *Sindermann* decisions.[148] As stated previously, cases involving deprivation of liberty are completely dependent on the facts of the case. School officials can avoid needless litigation on such a question by (1) complying with the applicable statutes for nonrenewal in the case of public school teachers, and (2) avoiding any accusations against dismissed professors that would require later substantiation at a hearing.[149]

The other primary exception applicable to every state will be that of contracts, both express and implied. In regard to express contracts, the presence of any provision guaranteeing a statement of reasons or a hearing is a function of the parties involved. If the school wishes to expressly obviate the need for any such conditions beyond those provided by statute or constitutional guarantees, it can insert such a provision in the contract. The benefit of such a course would be that the school would enjoy the widest possible latitude in selecting its faculties.

Implied contracts will predictably cause the most consternation.[150] If in fact the current market is in favor of the schools, several fundamental clauses can be inserted in individual contracts that would negative most implied contracts. For instance, the standard integration clause, found in many contracts, to the effect that there are no collateral or prior agreements between the parties not included in the contract, could easily be added to teacher employment contracts. Furthermore, assuming a reference to the school code is incorporated in most public school contracts, it would be prudent to add a provision to the effect that such a reference in no manner affects the express duration of the contract.[151] At the college level, the professor should be given written notice to the effect that none of the benefits of tenure accrue to those who have not acquired it, other than those expressly granted by the individual institution.

Since the prior state of Pennsylvania law conformed with the *Roth* and *Sindermann* decisions, the Supreme Court stance can be readily absorbed into the existing legal framework. Implementation of the Court decisions should be a relatively easy procedure for the courts and schools of the Commonwealth.

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147. *See* note 49 and accompanying text *supra.*
148. *See* notes 52-76 and accompanying text *supra.*
149. *See* notes 52-62 and accompanying text *supra.*
150. *See* notes 67-72 and 125-135 and accompanying text *supra.*
151. *See* notes 127-131 and accompanying text *supra.*